No. 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian,

Petitioner

v.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, As Trustee Under Indenture Dated the 21st Day of March, 1928, Between Charles L. Cobb and the Chase National Bank of the City of New York, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS HANS DIETRICH SCHAEFER, BRUNO CARL REINICKE, ROBERT HANS REINICKE AND JOHANNE MARIA REINICKE SCHAEFER

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Questions Presented

1. Whether the instrument entitled "Amendment to Vesting Order 4551" dated April 6, 1953, issued eight years after the cessation of hostilities and eighteen months after the formal termination of the state of war between the United States and Germany, is unconstitutional, unlawful, and contrary to the Trading with the Enemy Act.

2. Whether the Attorney General is entitled to immediate possession of the corpus of the trust on the basis of said instrument.

3. Whether the judgment rendered in the prior litigation, which, among other things, denied that petitioner was entitled to immediate possession of the corpus of the trust and of all accumulations, is a bar to similar relief requested by the petitioner in this litigation without any new or different operative facts underlying the vesting orders, on the principles of *res judicata*.

Statutes Involved

The relevant provisions of Section 2 of the Trading with the Enemy Act, as amended, (hereafter briefly referred to as "T. E. A.") are set forth in the Appendix, *infra*, pp. 31-32.

Statement

The action was brought by The Chase National Bank of The City of New York, Trustee under the indenture specified in the caption (hereinafter briefly "Trustee") for judicial settlement of its intermediate account of proceedings under an *inter vivos* trust. In view of the request of the Attorney General, as Successor to the Alien Property Custodian (hereinafter briefly "Custodian" or "Petitioner"), to deliver to him the trust property, the Trustee also asked the court to determine whether or not the principal of the trust should be transferred to the Custodian.

The Custodian, who was a party defendant to this action, appeared generally and filed an answer, demanding affirmative relief. He demanded judgment adjudging him to be entitled to immediate possession of the *corpus* and income of the trust, and ordering the payment and delivery of said property to him after the deduction of all expenses and charges.

Although certain objections were raised by the Custodian against the account of proceedings of the Trustee, the portion of the judgment of the Supreme Court, New York County, judicially settling the account of proceedings of the Trustee, is for all practical purposes beyond dispute.

Beyond dispute also are the following relevant and salient facts:

The trust herein is a continuing trust and has not terminated; the remainder interests created under the Trust Indenture, Article 6, are contingent in their nature; there are outstanding beneficial interests under the trust which have not yet validly vested; the ultimate remaindermen are not ascertainable and cannot be identified at this time (R. 160).

The trust fund and accumulated income thereof is held by the Trustee under the Indenture of Trust, dated March 21, 1928, and is not properly payable or deliverable to, or claimed by, or held for, or owned by any person, but is to be held, administered and disposed of by the Trustee as provided in the Indenture of Trust for future distribution not to take effect earlier than after the death of the survivor of Bruno Reinicke and his wife. All income is to be accumulated and added to the principal as provided in the Indenture, and authorized by the law of Illinois governing the trust (R. 160). Bruno Reinicke, Jr., the settlor, and his wife, and their three children, Bruno Carl Reinicke, Robert Hans Reinicke and Johanne Maria Reinicke Schaefer, were living on April 6, 1953 and are still living.

By Vesting Order 4551, dated January 29, 1945, (R. 67-72) the Custodian vested "all right, title, interest, and claim" in the trust of Bruno Reinicke, his wife and the three children.

Although the Supreme Court of the State of New York has determined in the prior litigation commenced in 1945 as well as in this litigation that the ultimate remaindermen are not ascertainable and cannot be identified then or now, the Custodian, in complete disregard of the prior judicial

determination, listed in the "Amendment to Vesting Order 4551" (R. 72-75) the same persons as were listed in the 1945 Vesting Order, and found that the property was owned by them and determined that they were "nationals" of Germany. In order to circumvent the binding effect of the prior valid adjudication, the Custodian purported to vest in himself the "res" of the trust.

The "Amendment to Vesting Order 4551", dated April 6, 1953, did not find and determine that the owners or beneficiaries of the trust were "enemies" as defined in Section 2 of T. E. A.

Bruno Carl Reinicke and Robert Hans Reinicke were born February 10, 1921 and October 8, 1923, respectively, in the United States, United States citizens by birth (R. 47). Bruno Carl Reinicke, Robert Hans Reinicke, and Johanne Maria Reinicke Schaefer were residents of the United States on the date of issuance of "Amendment to Vesting Order 4551".

The state of war between the United States and the Government of Germany was terminated by House Joint Resolution 289, on October 19, 1951 (65 Stat. 451), and by the Proclamation of the President of October 24, 1951 (Proclamation No. 2950, 50 U. S. C. A. Appendix, p. XX).

On April 17, 1953, the White House announced the termination of the program for vesting of German-owned properties located in the United States (Department of State Bulletin, May 18, 1953, p. 720 (R. 337). The press release stated among other things:

> "This action constitutes a further step in the orderly conclusion of a wartime measure inaugurated by the U. S. Government shortly after the outbreak of World War II."

Summary of Argument

1. The instrument entitled "Amendment to Vesting Order 4551", dated April 6, 1953, is unconstitutional, contrary to the Trading with the Enemy Act, and unlawful. It was issued after the formal termination of the state of

war with Germany by Joint Resolution of Congress, approved October 19, 1951 (65 Stat. 451) and the proclamation of the President of October 24, 1951 (Proclamation 2950, 50 U. S. C. A. Appendix, p. XX). By the express terms of the Trading with the Enemy Act, the Alien Property Custodian is authorized to vest property of enemies only during the time of war. *Miller* v. *Rouse,* 276 Fed. 715 (S. D. N. Y.); *Matheson* v. *Hicks,* 10 F. 2d 872 (E. D. N. Y.); *Sutherland* v. *Guaranty Trust Co.,* 11 F. 2d 696 (C. A. 2); *Brownell* v. *Edmunds,* 110 F. Supp. 828 (W. D. Va.). The said Joint Resolution, in part reserving the power to vest enemy property after the proclamation of the end of the war, is unconstitutional and contrary to international law, and the exercise of such vesting power by the said Amendment is unlawful. If the Trading with the Enemy Act or the Joint Resolution should be regarded as conferring such vesting power upon the Custodian, the Act or Resolution to this extent is unconstitutional.

2. The property attempted to be seized by the "Amendment to Vesting Order 4551" was not subject to vesting or seizure prior to January 1, 1947 under the provisions of the Trading with the Enemy Act. By a prior vesting order (Vesting Order 4551, dated January 29, 1945) the Custodian vested "all right, title and interest" in the trust of persons allegedly affected with "enemy taint". All other interests are clearly American: the Trustee is an American bank; Hans Dietrich Schaefer is an American citizen by birth, born on August 15, 1953, and he "may become entitled to the entire principal of said trust fund" (R. 338). Having exhausted all of his vesting power with respect to the trust, the Custodian belatedly issued an extended vesting order under the guise of an amendment. No legal effect should be given to such attempted seizure eight years after the cessation of hostilities, and eighteen months after the formal termination of the state of war with Germany.

3. The "Amendment to Vesting Order 4551" failed to determine upon investigation that the owners or beneficiaries of the trust are "enemies or allies of enemies" as

defined in Section 2 of the Trading with the Enemy Act. It could not so determine because the beneficiaries were not "enemies" at the date of vesting. It would serve no wartime purpose or any other legitimate purpose of the Trading with the Enemy Act to vest (eleven years after the factual cessation of hostilities) property that could not be retained. *Guessefeldt* v. *McGrath,* 342 U. S. 308. The sole result would be in effect the destruction of the trust. The interests of the United States are fully protected if the trust continues to be administered by the American Trustee. Absent a finding in the "Amendment to Vesting Order 4551" that the property is "enemy" (as defined in Section 2) the legal effect of the Amendment may be questioned in this action. This is an action by the Trustee for an accounting and for instructions in a court having jurisdiction over the Trustee and the trust property.

4. There is no authority in the Trading with the Enemy Act for the Custodian to take over and administer the trust by stepping into the shoes of the indenture Trustee. The Act provides that the Custodian shall have the power of a *common-law* trustee and not rights and duties circumscribed by an indenture of trust. *Zittman* v. *McGrath,* 341 U. S. 471, and *Brownell* v. *Singer,* 347 U. S. 403, are distinguishable since in the *Zittman* case the bank had no interest in the property except that of a stakeholder, while in *Brownell* v. *Singer* the property was in the hands of the New York Superintendent of Banks as liquidator.

5. The remedies under Section 9(a) of the Trading with the Enemy Act to which the infant Hans Dietrich Schaefer is relegated by the Custodian afford no protection to his interests since the remedies provided by that section are illusory and inadequate in the instant case. Section 9(a) requires that the claimant establish as of the time immediately prior to seizure his ownership of a proprietary interest in the property. The Custodian takes the position in this case (Petitioner's brief, p. 27), and would doubtless take a similar position in a Section 9(a) case, that "Schae-

fer's interest is contingent, not vested, and he has no present possessory interest to assert."

6. The 1948 judgment in the prior litigation affecting the trust is a complete bar to petitioner's present claim for possession of the trust *res*. In the prior action, in which Custodian's request that he was entitled to immediate possession of the trust *res* was denied, the underlying operative facts were the same as they are in this action. No new or additional "enemy interest" was specified or found to exist in the "Amendment to Vesting Order 4551". The Amendment is a mere device employed five years after the termination of the prior action to circumvent the binding effect of the prior judgment. The New York Court of Appeals in 1948 rejected the request for relief by the Custodian—relief identical with that sought in the present suit—and from the earlier judgment Custodian took no appeal to this Court. Petitioner is therefore barred by the doctrine of *res judicata* (*Angel* v. *Bullington*, 330 U. S. 183; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316; *U. S.* v. *International Building Co.*, 345 U. S. 502; *Cromwell* v. *County of Sac*, 94 U. S. 351).

ARGUMENT

POINT I

The instrument entitled "Amendment to Vesting Order 4551", dated April 6, 1953, is unconstitutional, contrary to the Trading with the Enemy Act, and unlawful.

The authority of the Custodian to vest stems from the constitutional grant of power to Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Said this Court in a leading case:

> "The Trading with the Enemy Act, whether taken as originally enacted . . . or as since amended . . . *is strictly a war measure** and finds its sanction in the

* Italics through this brief are ours unless otherwise indicated.

> constitutional provision . . . . empowering Congress 'to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water' " (*Stoehr* v. *Wallace,* 255 U. S. 239, 241-242).

The question, therefore, presents itself: when and how long can the "war power" be relied on as a basis for "strictly a war measure". The answer is provided by the Trading with the Enemy Act itself (40 Stat. 411 [1917]), as amended, 50 U. S. C. App. §§ 1-40): during time of war and until the "end of the war" within the meaning of the Act.

Section 2 of T. E. A. (50 U. S. C. App., § 2)[1] sets forth definitions for certain operative words and phrases used in the Act, and among others, "the beginning of the war" and the "end of the war".

> "The words 'end of the war', as used herein, shall be deemed to mean the date of proclamation of exchange ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act."

The state of war between the United States and the Government of Germany declared by the Joint Resolution of Congress, approved December 11, 1941 (55 Stat. 796), was officially terminated by Joint Resolution of Congress, approved October 19, 1951 (65 Stat. 451), and the Proclamation of the President of October 24, 1951 (Proclamation 2950, 50 U. S. C. A. Appendix, p. XX).[2]

The Joint Resolution provided, however, that notwithstanding the Resolution "any property or interest which

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[1] See Appendix, pp. 31, 32.

[2] The Contractual Agreements with the Federal Republic of Germany, bringing to an end the occupation of Germany and including the Federal Republic as an equal partner in the community of nations, were signed May 26, 1952. On August 6, 1952, President Truman formally ratified, pursuant to the advice and consent of the Senate, the Convention on Relations between the Three Powers and the Federal Republic of Germany. 26 Department of State Bulletin 887-888 (1952); 27 *ibid.* 220 (1952).

prior to January 1, 1947, was *subject to vesting or seizure* under the provisions of the Trading with the Enemy Act . . ., or which has heretofore been vested or seized under that Act . . . . shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this Resolution had not been passed and such proclamation had not been issued."

Petitioner contends that the above reservation authrized him to issue the "Amendment to Vesting Order 4551" after the "end of the war" within the meaning of T. E. A. (Petitioner's brief, p. 17). The contention is based on an erroneous construction of the constitutional war power (U. S. Constitution, Article 1, Section 8, Clauses 11 and 18), to wit, that it may be relied on in peace time. Such a construction is not only a contradiction in terms, but militates against the express language of the T. E. A., the Fifth Amendment and basic principles of international law.

After World War I the Joint Resolution of March 3, 1921 (41 Stat. 1359), terminating war time legislation, expressly exempted the T. E. A. from its operation and effect. The Joint Resolution terminating the state of war between the Imperial German Government and the United States, approved July 2, 1921 (42 Stat. 105) also expressly exempted from its operation and effect all German property "which was on April 6, 1917, in or has since that date come into possession or under control of or has been *subject of a demand* by the United States of America or of any of its officers, agents, . . .". The expressions "subject of a demand" in the Resolution adopted after World War I, and "subject to vesting or seizure" in the Resolution adopted after World War II are comparable.[3] The instrument of seizure during World War II was termed Vesting Order and was deemed effective upon publication in the Federal Register. Notwithstanding the quoted reser-

[3] "During World War I the instrument of seizure was termed a 'demand' and the seizure was made by service of that instrument. As of date of 'notice' of the demand the property 'vested' in the Custodian" (Custodian's brief on appeal to the Appellate Division, p. 31).

vation, the decisions rendered after World War I held that the Custodian's right to seize enemy property ceased when the state of war between the United States and Germany ended.

Miller v. *Rouse*, 276 Fed. 715, 717 (S. D. N. Y.)

Matheson v. *Hicks*, 10 F. 2d 872, 873 (E. D. N. Y.)

Sutherland v. *Guaranty Trust Co.*, 11 F. 2d 696, 698 (C. A. 2)

The Custodian endeavors to escape the effect of the holdings after World War I by arguing: "That Joint Resolution reserved, however, the authority to reduce to possession property which has already been seized by the service of an instrument deemed a 'demand' " (Petitioner's brief, p. 19, footnote 15). In the instant case, the "Amendment to Vesting Order 4551", dated April 6, 1953, was made, published and served eighteen months after the Joint Resolution and the property was not yet seized.

In *Miller* v. *Rouse, supra*, a demand signed before the date of the proclamation of peace in World War I was served three days after the proclamation. The court disagreed with the contention of the Custodian that the mere signing of the demand was sufficient and satisfied the requirement of the reservation "*has been subject of a demand*"; it held that the property did not become the "subject of a demand" until all steps were taken which would vest the property in the United States; and that such vesting did not occur until the demand was served, which demand, coming after the proclamation, was too late.

In *Matheson* v. *Hicks, supra*, the *third demand*, signed by Custodian Thomas W. Miller, dated November 8, 1921, stated to be *supplementary to former demands* and much more elaborate, was held to be ineffective, inasmuch as this latest demand was served after the formal termination of war with Germany, on July 2, 1921.

In *In re Sutherland*, 23 F. 2d 595, 599 (C. A. 2) the court said:

> "Peace with Germany was declared by resolution of Congress effective July 2, 1921 (42 Stat. 105), which ended the state of war then existing between the United States and Germany. The Custodian's right thereafter to seize enemy-acquired property ceased. *Sutherland* v. *Guaranty Trust Co.* (C. C. A.) 11 F. (2d) 696; *Miller* v. *Rouse* (D. C.) 276 F. 715."

A similar conclusion was reached in *Brownell* v. *Edmunds* 110 F. Supp. 828 (W. D. Va. 1953) where the court stated:

> "By the express terms of the Trading with the Enemy Act, the Alien Property Custodian is only authorized to vest in himself for the benefit of the United States, property of enemy nationals during the time of war. *Miller* v. *Rouse, supra*, *Matheson* v. *Hicks*, D. C. 10 F. 2d 872, *Sutherland* v. *Guaranty Trust Co.*, 2 Cir., 11 F. 2d 696." (110 F. Supp. at 833).

The Joint Resolution terminating the state of war between the United States and Germany did not amend the definition "end of the war". Petitioner's argument: "Without a hearing and without compensation, Congress, on October 18, 1951, could have enacted a statute transferring to the United States, or any agency of the United States, title to all German property within our reach, without calling upon any executive agency to act by way of seizure" (Petitioner's brief, p. 18)—is sheer conjecture. Extension of the use of war power for confiscation of property beyond the formal termination of the state of war would raise serious constitutional doubts and, possibly, render the statute invalid. It may be necessary in order to uphold the constitutionality of the Joint Resolution, to decide that the instrument entitled "Amendment to Vesting Order 4551", dated April 6, 1953, and the steps taken in pursuance thereof by the Custodian are unconstitutional, unlawful and invalid.

Petitioner's argument that continuation of the vesting authority beyond the formal termination of the state of war was within the war powers of Congress under the Constitution (Petitioner's brief, p. 18) is not sustained by the cases cited in support. *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146, did not involve the T. E. A. There this Court held valid a measure enacted into law after the signing of the Armistice with Germany on November 11, 1918, prohibiting the sale of alcohol for beverage purposes. The Court pointed out that the *mere cessation of hostilities* does not end the power of Congress to enact war measures. The statute there in question contained the provision that it would remain in effect "until the conclusion of the present war and thereafter until the termination of mobilization, the date of which shall be determined and proclaimed by the President".

Woods v. *Miller Co.*, 333 U. S. 138, involved the authority of Congress to regulate rents, after termination of *hostilities* and not termination of war. This Court said, Mr. Justice Douglas writing the majority opinion:

> "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that *if the war power can be used in days of peace* to treat all the wounds which war inflicts on our society, *it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well.*" (333 U. S. at pp. 143-144).

Concurring with the majority, Mr. Justice Jackson wrote:

> "Particularly when the *war power* is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and *do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.*
>
> "* * * I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended.

> *I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent*—as permanent as the war debts." (333 U. S. at pp. 146-147).

In the instant case, the Joint Resolution specifically declares the termination of the state of war but fails to fix a terminal date for seizure.

In *Ludecke* v. *Watkins*, 335 U. S. 160, this Court upheld on the authority of *Woods* v. *Miller*, *supra*, the deportation of an alien enemy after the cessation of actual hostilities on the ground that "when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the government" (Footnote 13, 335 U. S. 169). The Court in *Woods* stressed that "the political branch of the government has not brought the war with Germany to an end" (335 U. S. 170). In the instant case the war was brought to an end by the Presidential proclamation and the statutory definition (Section 2) of the "end of the war" thereby became operative.

The decision of this Court in *Commercial Trust Co.* v. *Miller*, 262 U. S. 51 does not aid the Custodian. There the first demand was served on July 8, 1918, and the second demand was served on April 17, 1919, that is, *long before* the adoption of the Peace Resolution by Congress on July 2, 1921. Therefore, the Custodian could and in fact did argue that his right to the possession of the property was not affected by the Armistice or by the termination of the war by Resolution of Congress and Proclamation of the President. There was no need for this Court to decide, nor did it decide, that German property can be seized after the end of the war. In the instant case the purported vesting took place after the termination of a state of war.

Petitioner argues: "A similar application of the war power is found in the cases dealing with treaties of peace. A provision for the continuation after the war of the authority to seize enemy property is a familiar one in such treaties; it is a part of the process of terminating the war" (Petitioner's brief, p. 20).

This petitioner's argument seems to have impressed the Court of Appeals for the Seventh Circuit in *Ladue & Co.* v. *Brownell,* 220 F. 2d 468, *cert. den.* 350 U. S. 823. The court there said:

> "We can perceive no real difference between the power of the Government to retain such seizure power, as against individuals, in a treaty and in the unilateral declaration by this nation of the termination of the state of war." (220 F. 2d 468, 471)

It is surprising, indeed, that the court could perceive no real difference, as the difference is obvious under constitutional and international law. A country, party to a peace treaty, may relinquish or assign its rights and its nationals' rights to property in this country, to be devoted to the payment of claims of the United States and its nationals. The agreement of the other country is designed to furnish the basis lacking in constitutional law for the confiscation of property in time of peace. "The vesting contemplated by Article 29 [in the Treaty of Peace with Hungary] is not the statutory vesting but has a much broader purpose" said the Court of Appeals for the District of Columbia in *Codray* v. *Brownell,* 207, F. 2d 610, 613 (C. A. D. C.), *cert. den.,* 347 U. S. 903, a decision referred to by the petitioner (Petitioner's brief, p. 20).[4] Characterization of confiscation pursuant to an international agreement as "proper exercise of the war power" and "incidental to the war and within the war powers" (*Ladue & Co.* v. *Brownell, supra,* pp. 471-472) is rationalization by attaching labels. The so-called "Litvinov Assignment" was not a peace treaty signed after a war between the two countries; yet it accomplished a similar result. (For the text of the Assignment, see *United States* v. *Pink,* 315 U. S. 203, 212.)

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[4] It is interesting to note that the Custodian in his brief in that case in opposition to petition for certiorari said (Brief in opposition, p. 20): "Second, the Treaty was a Treaty of Peace and the power to seize enemy property under the Trading with the Enemy Act does not survive *the end of the war. Sutherland* v. *Guaranty Trust Co.,* 11 F. 2d 69 (C. A. 2)."

A provision in a treaty cannot support an argument that Congress can seize property in time of peace by a unilateral act. Statutory vesting and seizure must constitute a valid exercise of a power granted by the Constitution.

The denial of the petition for certiorari by this Court in *Ladue & Co.* v. *Brownell,* 220 F. 2d 468 (C. A. 7), *cert. den.* 350 U. S. 823, has no legal significance for the purpose of the instant case because the action under Section 9(a) of T. E. A. was dismissed for failure of the claimant there to file the notice of claim required by Section 9(a). The principal question presented on petition for certiorari was whether petitioner may maintain an action for the recovery of property vested under T. E. A. without filing a sworn notice of claim as required by Section 9(a) of the Act. The Custodian argued that the filing of a notice of claim was a condition precedent of petitioner's right to maintain an action for the recovery of seized property or its proceeds and that this failure to comply with the terms of an exclusive statutory remedy made it unnecessary for the Supreme Court to reach other issues. Under the circumstances the discussion of the constitutionality of the authority to vest reserved in the Joint Resolution in the opinion of the Court of Appeals is *dictum* and otherwise fallacious.

Petitioner's reference to *National Savings and Trust Co.* v. *Brownell,* 222 F. 2d 395, (C. A. D. C.), *cert. den.,* 349 U. S. 955 (Petitioner's brief, p. 20) is not well taken. In that case the Custodian issued a so-called "right, title and interest" vesting order in 1948, and in February and May, 1951 issued so-called "*res*" vesting orders. The appellants argued that the constitutional power to seize property had terminated before these vesting orders were issued. The court there said:

> "So at the time of the vesting orders here involved hostilities had ceased and many factual circumstances premised upon peace had occurred; but no treaty of peace with Germany had been executed, *and neither the Congress nor the President had formally declared the end of the war with Germany.*" (222 F. 2d 396, 397)

The court foot-noted the statement quoted above as follows: "The President did issue such a Proclamation on October 24, 1951 * * *". (Footnote 10, 222 F. 2d 395, 397).

Referring to *Commercial Trust Co.* v. *Miller, supra,* the Court of Appeals in the *National Savings* case confined the holding of that case to the issues there presented. It concluded its opinion as follows:

> "In the case at bar we need go no further than the cited cases go. The sum of the facts and circumstances enumerated by our appellants does not total a termination of constitutional war power, so long as *neither the Congress nor the President had declared the end of the war.*" (222 F. 2d 395, 398)

With the war legally at an end and with the lapse of time since its termination in fact, the war power may not be relied upon to support the executive action here at issue.

POINT II

The Trust res was not subject to vesting or seizure prior to January 1, 1947 under the provisions of the Trading with the Enemy Act.

Assuming, but not conceding, that the vesting of German-owned property after the termination of the state of war with Germany was constitutional and in accord with established principles of international law, the vesting of the trust *res* herein was unlawful. Quite aside from the absence of a formal finding that the trust is "property or interest which prior to January 1, 1947 *was subject to vesting or seizure*" under the provisions of T. E. A., the property herein was not subject to such vesting.

All that was subject to vesting prior to January 1, 1947 was vested by Vesting Order 4551, executed on January 29, 1945. By that Vesting Order the Custodian vested all re-

versionary interests and all existing beneficial interests. Nothing beyond these contingent interests was "enemy-owned".

The Trustee is an American bank.

Hans Dietrich Schaefer, an American citizen by birth, was born on August 15, 1953, and he "may become entitled to the entire principal of said trust fund" (R. 338). Yet, his interest was not, and could not have been vested prior to January 1, 1947, or on April 6, 1953.

Consequently, by the Vesting Order of January 29, 1945, the Custodian exhausted all the vesting power he had with respect to the trust. He may not belatedly issue an extended vesting order under the guise of an amendment. To grant legal effect to such seizure 8 years after the cessation of hostilities, 18 months after the formal termination of war, and on the eve of the President's announcement on April 17, 1953 of the termination of further vesting of German property (R. 377), would subvert the policy underlying T. E. A.

The national interest of the United States is adequately protected by the vesting under the 1945 Vesting Order of "all right, title, interest and claim" of the settlor, his wife and children, and by the provision in the judgment appealed from that "no payment of income, of principal or of accumulated income of the said trust shall be made to any beneficiary without 60 days' written notice to the Attorney General of the United States to be given by registered mail" (R. 177). On the other hand, the delivery of the trust fund to the Custodian would cause irreparable damage to the fund and to the property interests of private persons, among them an infant American citizen.

It is to be remembered that T. E. A., as amended, is not a "carefully matured enactment", but legislation of a "makeshift patchwork", and therefore a wise latitude of construction should be adopted in enforcing its provisions. So said this Court in *Guessefeldt* v. *McGrath*, 342 U. S. 308, 319.

POINT III

"Amendment to Vesting Order 4551" dated April 6, 1953, is contrary to the Trading with the Enemy Act and does not authorize the Custodian to seize and retain the Trust Property.

Section 7(c) of T. E. A. requires that a determination must be made before vesting, based upon preliminary investigation, that the property is owned by, or belongs to, or is held for, by, on account, or on behalf of, or for the benefit of an enemy. The "Amendment to Vesting Order 4551" (R. 72-75) recites that after investigation, a determination was made that certain persons are "nationals of a designated enemy country (Germany)". That is neither sufficient nor in compliance with the requirements of Section 7(c).

Thus the order fails to recite that the owners or beneficiaries of the trust are "enemies or allies of enemies" as defined in Section 2.[5] Moreover, the finding of ownership and control of trust property completely disregards the previous judgment, dated January 30, 1948.

The owner of the property must be an enemy on the date of vesting to sustain its vesting and retention as enemy property.[6] Congress did not provide that an "enemy" shall be deemed to include indiscriminately any individual who at any time after the outbreak of war resided in enemy territory.

On April 6, 1953, the equitable ownership of the trust could not be ascertained. The trust is a continuing trust

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[5] Such a finding was made, for instance, in the Vesting Order vesting 29 Italian and German vessels (7 F. R., pp. 5738, 5739, July 28, 1952).

[6] Said the Custodian in his brief in opposition to the petition for certiorari in Codray *v.* Brownell, 207 F. 2d 610, *cert. den.* 347 U. S. 903:

> "Even under the 1941 Amendment to the Act, the authority to seize property and retain it as against a suit under Section 9(a) of the Act is restricted to 'enemy' property. *Clark* v. *Uebersee Finanz Korporation*, 332 U. S. 480."

and has not terminated. The remainder interests created under Article 6 of the trust indenture are contingent in their nature. There are outstanding beneficial interests under the trust which have not yet validly vested; the ultimate remaindermen are not ascertainable and cannot be identified at this time (R. 160). The Trustee is an American bank without enemy taint. Pursuant to provision of the previous judgment the American Trustee exercises its own discretion in administration of the trust without any control and supervision except by the New York court (R. 156, 160, 161, 168, 221). The "Amendment" itself describes the property as "property in the possession, custody or control of the Chase National Bank of the City of New York, as trustee" (R. 74).

On April 6, 1953, the date of vesting, Bruno Carl Reinicke and Robert Hans Reinicke, American citizens by birth in the United States (R. 47), and Johanne Maria Reinicke Schaefer, resided in the United States; they were neither doing business within Germany nor acting as agents of the German government, nor does the Custodian so claim. Consequently, they did not on that date fall within the definition of "enemy" as prescribed by Section 2 of T. E. A.

At the time of the making of the "Amendment" there was in being an American citizen, the respondent Hans Dietrich Schaefer, born on August 15, 1953, at Detroit, Michigan, who has a contingent interest in the trust fund. The infant may become entitled to the *entire* trust fund upon the trust's termination (R. 159).

These facts show how baseless is the following statement of petitioner: "In this case, of course, there is no question that the enemy interests overwhelmingly predominate" (Petitioner's brief, p. 24).

Petitioner in his brief uses the terms "enemy", (pp. 14, 15, 16, 20, 24, 26) "enemy national", (pp. 7, 23) "German nationals", (13, 23) "national of a designated enemy country" (pp. 2, 5, 6, 23) interchangeably and as synonyms. Such usage is clearly improper. The term "national of a designated enemy country" is necessarily broader than

"enemy" in Section 2 of T. E. A.; it stems from Section 5(b), as amended in 1941. Section 5(b), however, does not distinguish between enemy and non-enemy property, and does not provide the standard for this differentiation.

Assuming, *arguendo,* that the above beneficiaries, as "non-enemies" within the meaning of Section 2, may assert their rights and claims under Section 9(a), as is asserted in the petitioner's brief, then the petitioner has vested more than he can retain. Said this Court in *Guessefeldt* v. *McGrath,* 342 U. S. 308:

> "It is clear that the Custodian can lawfully vest under § 5 a good deal more than he can hold against a § 9(a) action. *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554; *Clark* v. *Uebersee Finanz-Korp.,* 332 U. S. 480."

We submit that under the circumstances the statute should be construed so as to avoid confiscation.

> "Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited." (*Guessefeldt* v. *McGrath,* 342 U. S. 308, 319).

Petitioner's point that the correctness of the Custodian's finding that the property is "enemy" in character is challengeable only in a suit for recovery brought under Section 9(a) (Petitioner's brief, p. 16) is not well taken. There is no finding that the property is "enemy" in character as defined in Section 2. There is no vesting order in compliance with Section 7(c). This is not an action under Section 17, and the petitioner himself has finally conceded that he was "entitled to enforce in the state courts" the obligation to deliver possession (Petitioner's brief, p. 16). Under the circumstances the validity of the instrument or obligation based thereon may be questioned.

This does not amount to a request for judicial review of a determination as to "enemy ownership" recited in the instrument, but to a denial of the legal effectiveness of the

instrument. Moreover, even such determination can be challenged if its legal defects are apparent on its face and no adequate remedy is provided. The determination of ownership of the trust property itself (as distinguished from the second step—determination of the enemy character of the owners) is patently erroneous; it is contrary to the determination by the court in the prior action, and contrary to the provisions of the Trust Indenture and the facts prevailing after the previous judgment.

The validity of a vesting order may be called into question as a defense even to a summary possessory action by the Custodian under Section 17 of T. E. A. Thus, in *McGrath* v. *Manufacturers Trust Co.*, 338 U. S. 241, aff'g 169 F. 2d 932 (C. A. 2) the opinion of both the Court of Appeals and the Supreme Court repeated the language of the old World War I Section 17 cases. The Court of Appeals said, speaking through Judge Swan:

> "A suit under Section 17 of the Act is a summary proceeding to compel delivery of possession of enemy owner property which has been *effectively seized by a valid vesting order.*" (169 F. 2d 932, 934.)

The trust *res* herein has not been "effectively seized by a valid vesting order." The validity of the vesting order is contested. Moreover, this action is not "a summary proceeding". It is an action for judicial settlement of the account of proceedings of a Trustee, seeking also instructions of the court with jurisdiction over the Trustee and the trust fund, as to whether or not the petitioner is entitled to immediate possession of the trust *res*.

If Petitioner's "Amendment to Vesting Order 4551" is now enforced and the *corpus* of the trust surrendered to him, no wartime purpose will be served. The sole result will be in effect the destruction of the trust. Yet the interests of the United States are protected if the trust continues to be administered by the American Trustee.

POINT IV

The Trading with the Enemy Act does not authorize the Custodian to take over and administer the Trust by stepping into the shoes of an Indenture Trustee. Zittman v. McGrath, 341 U. S. 471, and Brownell v. Singer, 347 U. S. 403, Distinguished.

In *Zittman* v. *McGrath,* 341 U. S. 471, the Custodian demanded transfer of a credit from a debtor bank which had no interest in the credit except that of stakeholder. Similarly, in *Brownell* v. *Singer,* 347 U. S. 403, decided on the authority of the *Zittman* case, the fund to be paid over to the Custodian pursuant to a "turnover order" involved a fund of a Japanese bank's New York Agency in liquidation in the hands of the New York Superintendent of Banks. In the instant case, the bank is a Trustee which has the legal title to the property and administers the trust in accordance with the rights and duties fixed by the Indenture of Trust.

In the *Zittman* case the Vesting Order vested debts owed to a foreign national by a New York debtor bank, and debts evidenced by instruments endorsed by the foreign national and held by a Federal Reserve Bank. The Custodian also served a "turnover directive" describing the specific property which he required to be turned over to him.

In the instant case the New York courts held in the previous litigation that the equitable ownership of the trust fund cannot be ascertained until the termination of the trust. The Custodian completely ignored this determination in the "Amendment" to the Vesting Order. Since the underlying facts, to wit, the identity of "enemy interest" in the trust as specified in the Vesting Order, as well as in the Amendment thereto, are identical, the "Amendment to Vesting Order 4551" was but a mere device to circumvent the binding effect of previous adjudication. The New York courts properly adhered to their prior determination.

In *Zittman* v. *McGrath,* 341 U. S. 446, this Court held that in the case of a "right, title and interest" vesting

order the Custodian stepped into the shoes of the enemy banks, and in *Zittman* v, *McGrath*, 341 U. S. 471, it held that in the case of a so-called "*res*" vesting order the Custodian stepped into the shoes of the possessor (not the owner) of the credits and funds. These holdings point up sharply that the cited cases are inapplicable to the case at bar. The Custodian cannot step into the shoes of an *indenture trustee* of a *continuing trust*. There is no basis whatsoever for the Custodian to assume the circumscribed rights and the corresponding onerous duties and liabilities of an *indenture* trustee. T. E. A. provides that the Custodian shall have the power of a *common-law* trustee in respect of all property, other than money, delivered to him (Trading with the Enemy Act, § 12, 40 Stat. 411, as amended, 50 U. S. C. App. § 12).

POINT V

The remedy provided by Section 9(a) of the Act is illusory and inadequate in the instant case.

The relegation of the infant Hans Dietrich Schaefer to remedies under Section 9(a) of T. E. A. (the relegation to remedies of Section 32 has now been dropped) does not satisfy the requirements of due process of law. Born in the United States in 1953, this American citizen would be confronted with an argument advanced in similar cases by the Custodian which, if accepted in this case, renders the statutory remedies illusory. The reassurance to the infant that he may avail himself of the remedies under Section 9(a), that "Section 9(a) is to be liberally construed to protect non-enemy persons," or that he may obtain relief in a court of equity (Petitioner's brief, pp. 26-27), is cold comfort. There is no guarantee that the petitioner will refrain from arguing that Section 9(a) provides the only judicial remedy for reclaiming vested property, and that the infant Schaefer did not have the requisite proprietary interest as of the time immediately prior to seizure. Yet if that is so then there is no other course left to Hans Dietrich

Schaefer but to defend his interests in this suit. The notice of claim on his behalf was filed (Petitioner's brief, p. 28, footnote 22) as a measure of precaution of the *Guardian Ad Litem*, and in view of anticipated argument by the Custodian that such a notice is a prerequisite of suit under Section 9(a).

Both Sections 9(a) and 32 require that the claimant establish, as of the time immediately prior to seizure, his ownership of a proprietary interest in the property. Similar statutory language in Sections 9(a) and 32 forms the basis of the proprietary interest concept. Section 9(a) allows return of an "interest, right or title in" the vested property, and Section 32 permits recovery of "any property or interest vested" by the Custodian. Courts under Section 9(a), and the Custodian under Section 32, have generally construed this concept narrowly. For example, the requisite proprietary interest has not been found in remote contingent remainders (*Koehler* v. *Clark*, 170 F. 2d 779 [C. A. 9], where claimant had "an inalienable and unsaleable possible expectancy"). In addition to establishing proprietary interests, claimants must prove ownership of such interests at the date of vesting (*Berger* v. *Ruoff*, 195 F. 2d 775 [C. A. D. C.], *cert. den. sub nom. Berger* v. *McGrath*, 343 U. S. 950; *Corn Exchange Bank* v. *Miller*, 15 F. 2d 456 [S. D. N. Y.]).

Petitioner's relegation of Schaefer to Section 9(a) is nullified by his own statement: "On the record, Schaefer's interest is contingent, not vested, and he has no present possessory interest to assert" (Petitioner's brief, p. 27).

POINT VI

The Judgment in the prior litigation is a complete bar to the Petitioner's present claim.

The prior action was commenced by the Trustee in 1944. The Trustee there requested judicial settlement of its intermediate account and, in addition, construction of a provision of the Trust Indenture. The provision in ques-

tion (Article 7, R. 37) gave to the Trustee broad discretionary powers of management, subject to prior approval by the settlor, Bruno Reinicke, Jr., during his lifetime, and thereafter by his wife. Alleging that Reinicke and his wife "when last heard from were in Germany", and that the War made communication with them impossible, the Trustee requested a determination permitting exercise of the discretionary powers conferred upon it by Article 7 of the Trust Indenture without giving notice to or obtaining the approval of the settlor or his wife.

The Trustee further requested "that any and all questions which may be raised by any party to this action be determined".

On January 29, 1945, the petitioner issued Vesting Order 4551, and thereafter intervened in the action, requesting judgment that the Trustee be directed to deliver to him, upon termination of the trust, the shares therein of the persons whose interests he had vested; and that he had succeeded to certain powers over the trust (R. 12).

Finally, petitioner requested "*that the entire principal of the said trust should be transferred to the Attorney General* as Successor to the Alien Property Custodian on the ground that all interests in the trust had vested in the Attorney General by said vesting order #4551" (R. 155-156).

After trial, judgment was entered in the prior litigation (R. 211-224) denying the petitioner the affirmative relief he had requested of the New York Supreme Court.

On appeal, the Appellate Division of the Supreme Court affirmed (*Chase National Bank* v. *McGrath*, 276 App. Div. 831). Upon further appeal, the New York Court of Appeals affirmed, the Reporter noting that the petitioner had asserted:

> "(1) [T]hat the trust powers reserved to the settlor had passed, along with the settlor's property, to the Attorney General by reason of the vesting order, and (2) that if the vesting order had not effected such a transfer then the trust had failed and all of the trust

property should pass to the Attorney General under the vesting order as being property of alien enemies" (Reporter's Notes, *Chase National Bank* v. *McGrath*, 301 N. Y. 602, 603-604).

The 1948 judgment, therefore, fixed the rights of the parties as to receipt and disposition of trust income and exercise of management powers, and further as to the possession of the trust corpus.

Armed with the "Amendment to Vesting Order 4551", petitioner demanded judgment in the present action entitling him to "immediate possession of the property comprising the net corpus of the trust * * * with all income, accumulations and increments thereon in the possession of or under the control of" the Trustee (R. 65). The Amendment was thus the chosen instrument of the petitioner to destroy the very rights finally adjudicated and established by the judgment in the prior action. He is barred, however, by the doctrine of *res judicata*.

To avoid the bar of *res judicata* petitioner argues that the issues in the present action are different from those presented in the earlier suit because the Amendment was "a distinct and independent act of seizure" (Petitioner's brief, p. 11, footnote 8) creating a new cause of action.

The "Amendment to Vesting Order 4551", upon which the petitioner so relies, in fact creates no new right. It is merely a new device, without genuine legal effect for the purposes of this case; a device designed to circumvent the judgment of a competent tribunal, twice affirmed by the appellate courts.

The government's cause of action under T. E. A., while in form based upon a document called a vesting order, is in fact predicated upon a finding of enemy ownership or control of property in the United States (Sections 5(b) and 7(c), T. E. A.; 50 U. S. C. Appendix, §§ 5(b) and 7(c); *American Exch. Nat. Bank* v. *Garvan*, 273 F. 43 [C. A. 2], aff'd 260 U. S. 706). The Amendment (R. 72-75) recites precisely the same list of alleged "nationals of a designated enemy country" as owners of the property being vested as

does Vesting Order 4551 (R. 67-72). No new or different enemy interests were vested by the Amendment. Of course, it is not claimed that the Trustee is an enemy. And the infant party, Hans Dietrich Schaefer, is an American citizen and, in any event, was not in being prior to January 1, 1947, so that his interest was not subject to vesting.

There is, therefore, no difference in substance between the "enemy-owned" property vested by Vesting Order 4551 and the "enemy-owned" property vested by the Amendment thereto. Only the instrument purporting to evidence the vesting is different. The issuance of such new instrument (the Amendment) may be a new fact, as the petitioner asserts, but it in nowise affects the underlying claim to vest enemy-owned property. This arises not out of the vesting order, *ipso facto,* but from the fact of enemy ownership and control. The quantum of such ownership has not changed since the entry of judgment in the prior action, nor does the petitioner so claim. With respect to control, moreover, the settlor was stripped completely of all powers over the trust by the terms of the prior judgment (R. 221, paragraph 8).

As this Court has pointed out:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. * * * The thing, therefore, which in contemplation of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.* (*Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321 [1927]." Italics by the Court.) See, also, *Hurn* v. *Oursler,* 289 U. S. 238, 246.

The "legal wrong" upon which the Custodian's claim was based in the prior action, and upon which it is based

in the present suit, is the alleged ownership by the same "enemy nationals" of property within the United States. The judgment in the earlier suit denying the Custodian's claim to possession is conclusive in the present proceeding as well. Its effect may not be avoided by an Amendment issued 8 years later, but based upon identical factual findings.

Claiming in the earlier suit that the "entire principal of the said trust should be transferred to the Attorney General" (R. 155-156), the petitioner seeks now to avoid the binding effect of the prior adjudication denying him such relief. Petitioner argues (Petitioner's brief, p. 21) that his request for possession in the earlier suit was based on the vesting of designated "interests" and not on a vesting of the corpus.

Such reasoning will not withstand analysis. It is the finding of enemy ownership or control that lends validity to a vesting order. Enemy ownership—not the mere issuance of a vesting order (of whatever variety, "right, title and interest" or "*res*")—creates the cause of action under T. E. A.

Indeed, petitioner recognizes the force of the argument, for he argues by implication in support of the validity of his attempted seizure (Petitioner's brief, pp. 23-24) that findings of enemy ownership and control are the essential basis for the seizure of property as "enemy". Without such findings there can be no valid vesting for any purpose. The claim that the issuance of the Amendment creates a new and different cause of action (Petitioner's brief, p. 22) thus falls of its own weight. Absent findings of enemy ownership or control there may be no vesting and no seizure, whether by "right, title and interest" or "*res*" vesting order. As previously pointed out, the 1953 finding of enemy taint in this case is precisely identical with the finding incorporated in the 1945 vesting order. Nothing more and nothing less in the way of enemy interests was found. The ritualistic use of the word "*res*" is the weapon with which the petitioner seeks to destroy the effect of the prior

judgment. But petitioner attempted, in the prior litigation, in effect to vest the "*res*", and failed. From the prior judgment of the State's highest court denying that relief, petitioner took no appeal.

In *Angel* v. *Bullington*, 330 U. S. 183, this Court held that where the plaintiff raised a federal question in a state court, and the state court adjudicated that question, plaintiff's failure to appeal to the United States Supreme Court from the state judgment foreclosed further adjudication of the issue. The decision of the state court became final and barred plaintiff from further litigating the same cause of action.

Said the Court:

> "That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 325. A higher court was available for an authoritative adjudication of the federal questions involved" (330 U. S. 183, 187).

The Court went still further, holding that even a state court determination specifically declining to reach or pass upon the substantive federal issues will bar a second attempt to reach them in another court of the state (330 U. S. 183, 190-191).

Even assuming the causes of action in the two suits to have been different, by reason of the different labels attached to the vesting orders, upon matters actually litigated and determined in the original action the earlier judgment remains conclusive.

U. S. v. *International Building Co.*, 345 U. S. 502, 504-505

Cromwell v. *County of Sac*, 94 U. S. 351, 352-353.

Whether under the principle of *res judicata*, applicable to suits based upon the same cause of action, or the narrower doctrine of collateral estoppel, petitioner has had his day in court on his claim that he is entitled to possession of the

corpus of the trust herein. The Amendment to Vesting Order 4551 adds nothing to his right where the operative facts of enemy interest remain identical (as concededly they do), and where in the prior suit petitioner demanded identical relief.

Conclusion

The "Amendment to Vesting Order 4551", dated April 6, 1953, is unconstitutional, contrary to the Trading with the Enemy Act, and otherwise unlawful. It was a mere device to circumvent the valid prior adjudication of the Court of Appeals of the State of New York. To grant the relief requested by petitioner now would serve no wartime or other legitimate purposes of the Trading with the Enemy Act but would destroy the trust and would amount to confiscation of American and non-enemy property in time of peace.

For the foregoing reasons, the judgment of the Supreme Court of the State of New York should be affirmed.

July, 1956

Respectfully submitted,

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APPENDIX

1. Trading with the Enemy Act, as amended, 40 Stat. 411, 50 U. S. C. App: § 1, et seq.:

SEC. 2. Definitions

The word "enemy", as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

* * * * *

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such

territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

* * * * *

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy".

* * * * *

The words "the beginning of the war," as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act.

* * * * *